

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
AGENCY APPEAL PRE-ARGUMENT STATEMENT (FORM C-A)**

☒ APPLICATION FOR ENFORCEMENT

☐ PETITION FOR REVIEW

1. SEE NOTICE ON REVERSE.

2. PLEASE TYPE OR PRINT.

3. PAPERCLIP ANY ADDITIONAL PAGES

CAPTION: NATIONAL LABOR RELATIONS BOARD v. BROOKDALE SENIOR LIVING COMMUNITIES, INC. D/B/A STERLING HOUSE OF NIAGARA		AGENCY NAME: National Labor Relations Board		AGENCY NO.: . 03-CA-173607, 03-CA-173613, 03-CA-175187, 03-CA-175675, 03-CA-176994	
		DATE THE ORDER UPON WHICH REVIEW OR ENFORCEMENT IS SOUGHT WAS ENTERED BELOW: October 17, 2016		ALIEN NO : (Immigration Only)	
		DATE THE PETITION OR APPLICATION WAS FILED: November 16, 2016		Is this a cross petition for review / cross application for enforcement? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
Contact Information for Petitioner(s) Attorney:	Counsel's Name: Linda Dreeben		Address: Nat'l Labor Relations Board 1015 Half Street, S.E. Washington, D.C. 20570		Telephone No.: (202) 273-2960 E mail: AppellateCourt@nlrb.gov
	Fax No.: (202) 273-0191				
Contact Information for Respondent(s) Attorney:	Counsel's Name: Fred Schwartz, Esq.		Address: 321 N. Clark St., Ste 1000 Chicago, IL 60654		Telephone No.: (312) 795-3230; (914) 872-8060 E mail: fschwartz@littler.com; passarellam@jacksonlewis.com
	Michael Passarella, Jackson Lewis, P. C		44 S. Broadway, 14th Flr White Plains, NY 10601		Fax No.: (312) 372-7880; (914) 946-1216
JURISDICTION OF THE COURT OF APPEALS (provide U.S.C. title and section): 29 USC § 160(e)	APPROX. NUMBER OF PAGES IN THE RECORD:	APPROX. NUMBER OF EXHIBITS IN THE RECORD:	Has this matter been before this Circuit previously? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, provide the following: Case Name: 2d Cir. Docket No.: Reporter Citation: (i.e., F.3d or Fed. App.)		
ADDENDUM "A": COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; AND (3) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT.					
ADDENDUM "B": COUNSEL MUST ATTACH TO THIS FORM: (1) THE RELIEF REQUESTED; (2) A LIST OF THE PROPOSED ISSUES; AND (3) THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.					
PART A: STANDING AND VENUE					
<u>STANDING</u> PETITIONER / APPLICANT IS: <input checked="" type="checkbox"/> AGENCY <input type="checkbox"/> OTHER PARTY <input type="checkbox"/> NON PARTY (SPECIFY STANDING):			<u>VENUE</u> COUNSEL MUST PROVIDE IN THE SPACE BELOW THE FACTS OR CIRCUMSTANCES UPON WHICH VENUE IS BASED: Venue is proper because unfair labor practices occurred in New York.		

IMPORTANT. COMPLETE AND SIGN ON PAGE 2 OF THIS FORM.

PART B: NATURE OF ORDER UPON WHICH REVIEW OR ENFORCEMENT IS SOUGHT
(Check as many as apply)

TYPE OF CASE:

_____ ADMINISTRATIVE REGULATION / RULEMAKING	IMMIGRATION includes denial of an asylum claim
_____ BENEFITS REVIEW	IMMIGRATION does not include denial of an asylum claim
<u>X</u> _____ UNFAIR LABOR	_____ TARIFFS
_____ HEALTH & SAFETY	OTHER: (SPECIFY) _____
_____ COMMERCE	
_____ COMMUNICATIONS	
_____ ENERGY	

1. Is any matter relative to this petition or application still pending below? ☐ Yes, specify: _____ ☒ No

2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:

(A) Arises from substantially the same case or controversy as this petition or application ? ☐ Yes ☒ No

(B) Involves an issue that is substantially similar or related to an issue in this petition or application ? ☐ Yes ☒ No

If yes, state whether ☐ "A," or ☐ "B," or ☐ both are applicable, and provide in the spaces below the following information on the *other* action(s):

Case Name:	Docket No.	Citation:	Court or Agency:
Name of Petitioner or Applicant:			

Date: November 15, 2016

Signature of Counsel of Record: /s/ Linda Dreeben

NOTICE TO COUNSEL

Once you have filed your Petition for Review or Application for Enforcement, you have only ten (10) calendar days in which to complete the following important steps:

1. Complete this Agency Appeal Pre Argument Statement (Form C A), serve it upon all parties, and file an original and one copy with the Clerk of the Second Circuit.
2. Pay the \$250 docketing fee to the Clerk of the Second Circuit, unless you are authorized to prosecute the appeal without payment.

PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN TEN (10) CALENDAR DAYS, YOUR PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT WILL BE DISMISSED. SEE THE CIVIL APPEALS MANAGEMENT PLAN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ADDENDUM “A”

(1) A Brief Description of the Nature of the Action:

This is an action to enforce an NRLB order. On October 17, 2016, the Board entered an order against Respondent pursuant to a stipulation authorizing the Board to enter an order embodying its terms. The Board’s order does not vary from those terms. Paragraph VII of the settlement agreement authorized the Board to apply to an appropriate U.S. Court of Appeals for a judgment enforcing the Board’s order and provided that Respondent “waives all defenses to the entry of the judgment” The Board, pursuant to the terms of the settlement, seeks a judgment enforcing the Board’s order in full.

(2) The result below:

The Board entered an order against Respondent pursuant to a stipulation authorizing the Board to enter an order embodying its terms.

(3) Relevant Opinions and Orders: Attached.

ADDENDUM “B”

(1) Relief requested:

Enforcement of the October 17, 2016, Decision and Order of the National Labor Relations Board.

(2) List of Proposed Issues:

The Board, pursuant to the terms of the stipulation, is entitled to summary entry of a judgment enforcing its order against Respondent.

(3) Applicable standard of review:

The Board is entitled to enforcement because Respondent has expressly consented to entry of this judgment in a stipulation that Respondents entered into with the Board.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BROOKDALE SENIOR LIVING COMMUNITIES, INC.
D/B/A STERLING HOUSE OF NIAGARA**

and

**UNITED FOOD AND COMMERCIAL WORKERS
DISTRICT UNION LOCAL ONE**

**Cases 03-CA-173607
03-CA-173613
03-CA-175187
03-CA-175675
03-CA-176994**

DECISION AND ORDER

Statement of the Cases

On August 15, 2016, Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Niagara (the Respondent), United Food and Commercial Workers District Union Local One (the Union), and the General Counsel of the National Labor Relations Board entered into a Formal Settlement Stipulation, subject to the Board's approval, providing for the entry of a consent order by the Board and a consent judgment by any appropriate United States Court of Appeals. The parties waived all further and other proceedings before the Board to which they may be entitled under the National Labor Relations Act and the Board's Rules and Regulations, and the Respondent waived its right to contest the entry of a consent judgment or to receive further notice of the application therefor.

The Formal Settlement Stipulation is approved and made a part of the record, and the proceeding is transferred to and continued before the Board in Washington, D.C., for the entry of a Decision and Order pursuant to the provisions of the Formal Settlement Stipulation.

Based on the Formal Settlement Stipulation and the entire record, the Board makes the following

Findings of Fact

1. The Respondent's business

The Respondent is a corporation with an office and place of business located in North Tonawanda, New York (the Respondent's facility), where it has been operating an assisted living center.

Annually, in conducting its business operations as described above, the Respondent derives gross revenues in excess of \$100,000 and purchases and receives

at its North Tonawanda, New York facility goods valued in excess of \$5,000 directly from points outside the State of New York.

The Respondent is now and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The labor organization involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed at the Sterling House location, excluding Health and Wellness Director, Resident Program Coordinator, Executive Director, Business Office Manager/Receptionist, Sales Manager, Dining Services Coordinator, Hair Stylist, guards and confidential employees, and professional employees and supervisors as defined in the Act.

ORDER

Based on the above findings of fact, the Formal Settlement Stipulation, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board orders that the Respondent, Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Niagara, North Tonawanda, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Promising employees a wage increase if they remove the Union as their bargaining representative;

(b) Promising employees a wage increase because they are no longer in the Unit for the purpose of undermining the Union;

(c) Making statements intended to undermine the Union and its contract ratification process.

(d) Failing and refusing to recognize the Union as the collective-bargaining representative of the employees in the appropriate bargaining unit set forth below:

All full-time and regular part-time employees employed at the Sterling House location, excluding Health and Wellness Director, Resident Program Coordinator, Executive Director, Business Office Manager/Receptionist, Sales Manager, Dining Services Coordinator, Hair Stylist, guards and confidential employees, and professional employees and supervisors as defined in the Act.

(e) Failing to execute and abide by the collective-bargaining agreement negotiated with the Union;

(f) Maintaining a mandatory arbitration agreement at the Respondent's facility, located at 6741 Nash Rd., North Tonawanda, New York 14120, that prohibits employees from engaging in protected concerted activities, including class or collective action addressing terms and conditions of employment;

(g) Implementing and maintaining a dispute resolution procedure without bargaining with the Union;

(h) Refusing to grant to Unit employees a wage increase which had been granted to non-Unit employees in retaliation for pro-union activities;

(i) Granting retroactive wage increases to employees that leave the Unit in order to discourage pro-union activities;

(j) Granting wage increases without bargaining with the Union except as permitted by the collective-bargaining agreement;

(k) Imposing discretionary discipline on Unit employees without bargaining with the Union unless a collective-bargaining agreement containing a grievance procedure is in effect;

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit employees;

(b) Execute and abide by the terms of the collective-bargaining agreement effective by its terms from May 1, 2016 through May 1, 2019, and give retroactive effect to the terms of the agreement as of May 1, 2016;

(c) Make whole its employees for loss of pay and benefits suffered by reason of the Respondent's refusal to execute and give effect to the collective-bargaining agreement agreed to by the parties effective by its terms from May 1, 2016 through May

1, 2019, restoring whatever rights and privileges employees may have lost by reason of the Respondent's failure to execute and give effect to the agreement, including pay all non-probationary employees wage increases consistent with Article 39 of the collective-bargaining agreement, retroactive to May 1, 2016, with interest, in accordance with the Board's decisions in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010);

(d) Upon request of the Union, rescind the Brookdale Dispute Resolution Agreement as it pertains to members of the Unit;

(e) Rescind the portion(s) of the Brookdale Dispute Resolution Agreement in effect at the Respondent's facility, located at 6741 Nash Rd., North Tonawanda, New York 14120, that prohibits employees from engaging in protected concerted activities, including class or collective action addressing terms and conditions of employment;

(f) Upon request of the Union, grant Unit employees, retroactive to March 1, 2015, the same wage increases granted to former Unit employees Kuntz and Matters upon their transfer out of the Unit;

(g) Upon request of the Union, rescind and bargain collectively and in good faith with the Union over the December 2015 suspension of its employee Matters;

(h) Before implementing any future changes in wages, hours, or other terms and conditions of employment affecting members of the Unit, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of employees in the Unit except as permitted by the collective-bargaining agreement;

(i) Within 14 days of service by the Region, post at its North Tonawanda, New York facility copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by Region 3, after being signed by the Respondent's authorized representative(s), shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the Respondent shall hold a mandatory meeting or meetings scheduled to ensure the widest possible attendance, at which the Respondent's representative will read the notice to the employees on work time in the presence of a Board agent. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former bargaining unit employees employed by the Respondent since April 4, 2016.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply with this agreement.

Dated, Washington, D.C., October 17, 2016.

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

**PURSUANT TO A STIPULATION PROVIDING FOR A BOARD ORDER
AND A CONSENT JUDGMENT OF ANY APPROPRIATE
UNITED STATES COURT OF APPEALS**

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose a representative to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail and refuse to recognize the United Food and Commercial Workers, District Union Local One (Union) as the collective-bargaining representative of all employees in the appropriate bargaining unit (Unit) set forth below:

All full-time and regular part-time employees employed at the Sterling House location, excluding Health and Wellness Director, Resident Program Coordinator, Executive Director, Business Office Manager/Receptionist, Sales Manager, Dining Services Coordinator, Hair Stylist, guards and confidential employees, and professional employees and supervisors as defined in the Act.

WE WILL NOT refuse to execute and abide by the collective-bargaining agreement we negotiated with the Union.

WE WILL NOT promise employees a wage increase if they remove the Union as their bargaining representative.

WE WILL NOT promise employees a wage increase because they are no longer in the Unit for the purpose of undermining the Union.

WE WILL NOT tell employees that the Union lied to them about the parties reaching a contract agreement and refer to the contract agreement as "fraudulent".

WE WILL NOT maintain a mandatory arbitration agreement at this facility that prohibits employees from engaging in protected concerted activities, including class or collective action addressing terms and conditions of employment.

WE WILL NOT implement and maintain a dispute resolution procedure without bargaining with the Union.

WE WILL NOT refuse to grant wage increases to Unit employees, which had been granted to non-Unit employees, in order to discourage pro-union activities.

WE WILL NOT grant wage increases without bargaining with the Union except as permitted by the collective-bargaining agreement.

WE WILL NOT impose discretionary discipline on Unit employees without bargaining with the Union unless a collective bargaining agreement containing a grievance procedure is in effect.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit employees.

WE WILL execute and abide by the terms of the collective-bargaining agreement effective by its terms from May 1, 2016 through May 1, 2019, and give retroactive effect to the terms of the agreement as of May 1, 2016.

WE WILL make our employees whole for loss of pay and benefits suffered by reason of our refusal to execute and give effect to the collective-bargaining agreement agreed to by the parties effective by its terms from May 1, 2016 through May 1, 2019, restoring whatever rights and privileges employees may have lost by reason of our failure to execute and give effect to the agreement, including pay all non-probationary employees wage increases consistent with Article 39 of the collective-bargaining agreement, retroactive to May 1, 2016, with interest.

WE WILL, upon request of the Union, rescind the Brookdale Dispute Resolution Agreement as it pertains to members of the Unit.

WE WILL rescind the portion(s) of the Brookdale Dispute Resolution Agreement at this facility that prohibit employees from engaging in protected concerted activities, including class or collective action addressing terms and conditions of employment.

WE WILL grant Unit employees the same wage increases granted to former Unit employees Kuntz and Matters upon their transfer out of the Unit, retroactive to March 1, 2015.

WE WILL, upon request of the Union, rescind and bargain collectively and in good faith with the Union over the December 2015 suspension of our employee Matters.

Before implementing any future changes in wages, hours, or other terms and conditions of employment affecting members of the Unit, **WE WILL** notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the Unit except as such changes are permitted by the collective-bargaining agreement.

**BROOKDALE SENIOR LIVING COMMUNITIES, INC.
D/B/A STERLING HOUSE OF NIAGARA**

The Board's decision can be found at www.nlr.gov/case/03-CA-173607 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

